

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case Nos. 06-O-13672-DFM; 08-O-13868;
)	08-O-14600 (Cons.)
IVAN BARRY SCHWARTZ,)	
)	DECISION AND ORDER SEALING
Member No. 153264,)	CERTAIN DOCUMENTS
)	
A Member of the State Bar.)	
)	

INTRODUCTION

In this original, consolidated disciplinary proceeding, respondent **Ivan Barry Schwartz** (Respondent) was accepted for participation in the State Bar Court’s Alternative Discipline Program (ADP). Because Respondent has successfully completed the ADP, the court will recommend to the Supreme Court that Respondent be suspended from the practice of law in California for three years; that execution of that period of suspension be stayed; and that he be placed on probation for three years subject to certain conditions, including an actual suspension of six months, with credit given for his prior inactive enrollment, from December 1, 2010 through May 31, 2011, during his participation in the program. (Rules Proc. of State Bar, rule 5.384; Bus. & Prof. Code, § 6233.)

PERTINENT PROCEDURAL HISTORY

On October 29, 2008, a Notice of Disciplinary Charges (NDC) was filed against Respondent by the State Bar of California's Office of the Chief Trial Counsel (State Bar) in Case No. 06-O-13672. Thereafter Respondent requested referral for evaluation of his eligibility for participation in the State Bar Court's ADP. There being no opposition by the State Bar, the court granted Respondent's request.

In furtherance of his participation in the ADP, Respondent contacted the State Bar's Lawyer Assistance Program (LAP) to assist with his mental health issues and signed a LAP Participation Plan on March 5, 2009.

On May 19, 2009, an NDC was filed against Respondent in case No. 08-O-13868.

On August 24, 2009, Respondent submitted a declaration to the court, which established a nexus between Respondent's mental health issues and his misconduct in this matter.

On December 18, 2009, the parties waived the issuance of a third NDC against Respondent in case No. 08-O-14600.

The parties entered into three separate Stipulations Re Facts and Conclusions of Law (Stipulations). The Stipulations, filed December 18, 2009, set forth the factual findings, legal conclusions, and mitigating and aggravating circumstances in these matters. The three cases were then ordered to be consolidated.

The court issued a Confidential Statement of Alternative Dispositions and Orders, formally advising the parties of (1) the discipline which would be recommended to the Supreme Court if Respondent successfully completed the ADP and (2) the discipline which would be recommended if Respondent failed to successfully complete, or was terminated from, the ADP. Agreeing to those alternative possible dispositions, Respondent and his counsel executed the Contract and Waiver for Participation in the State Bar Court's ADP; the court accepted

Respondent for participation in the ADP; and Respondent's period of participation in the ADP began on December 18, 2009.

Respondent was placed on inactive enrollment effective December 1, 2010, and was returned to active status on June 1, 2011.

Respondent thereafter participated successfully in both the LAP and the State Bar Court's ADP. On June 20, 2011, after receiving a mental health recommendation from Respondent's therapist and a Certificate of One Year of Participation in the Lawyer Assistance Program - Substance Abuse, the court filed an order finding that Respondent has successfully completed the ADP.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parties' Stipulations, including the court's order approving the Stipulations, are attached hereto and hereby incorporated by reference, as if fully set forth herein. Respondent stipulated to willfully violating: (1) Rule 3-110(A) of the Rules of Professional Conduct of the State Bar of California¹ by failing to perform services competently; (2) Rule 4-100(A) by failing to maintain client funds in client trust account; (3) Rule 4-100(B)(4) by failing to promptly pay client funds; (4) Rule 4-200(A) by entering into an illegal fee agreement; (5) Rule 3-310(B)(1) by failing to avoid the representation of adverse interests; and (6) Business and Professions Code section 6106, by committing acts of moral turpitude [two counts].

In aggravation, Respondent has a prior record of discipline and committed trust violations. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, stds. 1.2(b)(i) and (iii).)²

¹ References to rules are to the Rules of Professional Conduct.

² All further references to standard(s) or std. are to this source.

In mitigation, Respondent displayed spontaneous cooperation and candor with the State Bar during the disciplinary investigation and proceedings. (Std. 1.2(e)(v).) In addition, it is appropriate to consider Respondent's successful completion of the ADP as a further mitigating circumstance in this matter. (Std. 1.2(e)(iv).)

DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney but, rather, to protect the public, preserve public confidence in the legal profession, and maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

In determining the appropriate alternative discipline recommendations if Respondent successfully completed the ADP or was terminated from, or failed to successfully complete, the ADP, the court considered the discipline recommended by the parties, as well as certain standards and case law. In particular, the court considered standards 1.2, 1.3, 1.4, 1.5, 1.6, 1.7(a), 2.2(a), 2.2(b), 2.3, 2.4(b), and 2.10, and *McKnight v. State Bar* (1991) 53 Cal.3d 1025, *In the Matter of Dyson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 280, *Kelly v. State Bar* (1988) 45 Cal.3d 649, and *Waysman v. State Bar* (1986) 41 Cal.3d 452.

Because Respondent has now successfully completed the ADP, this court, in turn, now recommends to the Supreme Court the imposition of the lower level of discipline, set forth more fully below, contained in the Confidential Statement.

RECOMMENDATIONS

Recommended Discipline

It is hereby recommended that Respondent **Ivan Barry Schwartz**, State Bar Number 153264, be suspended from the practice of law in California for three years, that execution of

that period of suspension be stayed, and that he be placed on probation³ for a period of three years subject to the following conditions:

- a. Respondent must be actually suspended from the practice of law for the first six months of his probation, with credit given for inactive enrollment, which was effective December 1, 2010, and terminated on June 1, 2011 (Bus. & Prof. Code, § 6233);
- b. During the probation period, Respondent must comply with the provisions of the State Bar Act and the Rules of Professional Conduct of the State Bar of California;
- c. Within ten (10) days of any change, Respondent must report to the Membership Records Office of the State Bar and to the Office of Probation of the State Bar of California (Office of Probation), all changes of information, including current office address and telephone number, or other address for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code;
- d. Within thirty (30) days after the effective date of discipline, Respondent must contact the Office of Probation and schedule a meeting with Respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, Respondent must meet with the probation deputy either in person or by telephone. During the period of probation, Respondent must promptly meet with the probation deputy as directed and upon request;
- e. Respondent must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10 and October 10 of the period of probation. Under penalty of perjury, Respondent must state whether Respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. Respondent must also state whether there are any proceedings pending against him in the State Bar Court and if so, the case number and current status of that proceeding. If the first report would cover less than thirty (30) days, that report must be submitted on the next quarter date, and cover the extended period.

In addition to all quarterly reports, a final report, containing the same information, is due no earlier than twenty (20) days before the last day of the period of probation and no later than the last day of the probation period;

³ The probation period will commence on the effective date of the Supreme Court order imposing discipline in this matter. (See Cal. Rules of Court, rule 9.18.)

- f. Subject to the assertion of applicable privileges, Respondent must answer fully, promptly and truthfully any inquiries of the Office of Probation which are directed to Respondent personally or in writing relating to whether Respondent is complying or has complied with the probation conditions;
- g. Within one (1) year of the effective date of the discipline herein, Respondent must provide to the Office of Probation satisfactory proof of attendance at a session of the Ethics School, and passage of the test given at the end of that session;⁴
- h. Respondent must comply with all provisions and conditions of his Participation Agreement/Plan with the Lawyer Assistance Program (LAP) and must provide the Office of Probation with certification of completion of the LAP. Respondent must immediately report any non-compliance with any provision(s) or condition(s) of his Participation Agreement/Plan to the Office of Probation. Respondent must provide an appropriate waiver authorizing the LAP to provide the Office of Probation and this court with information regarding the terms and conditions of Respondent's participation in the LAP and his compliance or non-compliance with LAP requirements. Revocation of the written waiver for release of LAP information is a violation of this condition. Respondent will be relieved of this condition upon providing to the Office of Probation satisfactory certification of completion of the LAP;
- i. Within one (1) year after the effective date of the discipline herein, Respondent must supply to the Office of Probation satisfactory proof of attendance at a session of the Ethics School Client Trust Accounting School,⁵ within the same period of time, given periodically by the State Bar at either 180 Howard Street, San Francisco, California, 94105-1639, or 1149 South Hill Street, Los Angeles, California, 90015-2299, and passage of the test given at the end of that session. Arrangements to attend Ethics School Client Trust Accounting School must be made in advance by calling (213) 765-1287, and paying the required fee. This requirement is separate from any Minimum Continuing Legal Education Requirement (MCLE), and Respondent will not receive MCLE credit for attending Trust Accounting School (Rules Proc. of State Bar, rule 3201); and

⁴ The Confidential Statement permitted Respondent to complete this condition during his period of participation in the ADP. If Respondent provides proof to the Office of Probation that he completed this condition during his period of participation in the ADP, Respondent need not again comply with this condition.

⁵ The Confidential Statement permitted Respondent to complete this condition during his period of participation in the ADP. If Respondent provides proof to the Office of Probation that he completed this condition during his period of participation in the ADP, Respondent need not again comply with this condition.

j. Reporting Requirements.

If Respondent possesses client funds at any time during the period covered by a required quarterly report, Respondent shall file with each required report a certificate from a certified public accountant or other financial professional approved by the Office of Probation, certifying that: Respondent has maintained a bank account in a bank authorized to do business in the State of California, at a branch located within the State of California, and that such account is designated as a "Trust Account" or "Client's Funds Account"; and Respondent has kept and maintained the following:

- i. a written ledger for each client on whose behalf funds are held that sets forth:
 1. the name of such client,
 2. the date, amount, and source of all funds received on behalf of such client,
 3. the date, amount, payee and purpose of each disbursement made on behalf of such client, and
 4. the current balance for such client;
- ii. a written journal for each client trust fund account that sets forth:
 1. the name of such account,
 2. the date, amount, and client affected by each debit and credit, and
 3. the current balance in such account;
- iii. all bank statements and canceled checks for each client trust account; and
- iv. each monthly reconciliation (balancing) of (i), (ii), and (iii) above, and if there are any differences between the monthly total balances reflected in (i), (ii), and (iii) above, the reason for the differences, and that Respondent has maintained a written journal of securities or other properties held for a client that specifies:
 1. each item of security and property held;
 2. the person on whose behalf the security or property is held;
 3. the date of receipt of the security or property;
 4. the date of distribution of the security or property; and
 5. the person to whom the security or property was distributed.

If Respondent does not possess any client funds, property or securities during the entire period covered by a report, Respondent must so state under penalty of perjury in the report filed with the Office of Probation for that reporting period. In this circumstance, Respondent need not file the accountant's certificate described above.

The requirements of this condition are in addition to those set forth in rule 4-100 of the Rules of Professional Conduct.

At the expiration of the period of probation, if Ivan Barry Schwartz has complied with all conditions of probation, the three-year period of stayed suspension will be satisfied and that suspension will be terminated.

Multistate Professional Responsibility Examination

It is further recommended that Ivan Barry Schwartz be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) within one year after the effective date of the Supreme Court's disciplinary order in this matter and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.⁶ Failure to do so may result in suspension. (Cal. Rules of Court, rule 9.10(b).)

California Rules of Court, Rule 9.20

The court does not recommend that Respondent be ordered to comply with California Rules of Court, rule 9.20, because he had previously complied with rule 9.20 in connection with his inactive enrollment under Business and Professions Code section 6233.

Costs

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that costs be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment. It is further recommended that such costs be paid with Respondent's membership fees for the billing cycle following the effective date of the Supreme Court order. If Respondent fails to pay costs as described above, or as may be modified by the State Bar Court, costs are due and payable immediately.

⁶ The Confidential Statement permitted Respondent to complete this requirement during his period of participation in the ADP. If Respondent provides proof to the Office of Probation that he completed this condition during his period of participation in the ADP, Respondent need not again comply with this condition.

DIRECTION RE DECISION AND ORDER SEALING CERTAIN DOCUMENTS

The court directs a court case administrator to file this Decision and Order Sealing Certain Documents. Thereafter, pursuant to rule 5.388(C) of the Rules of Procedure of the State Bar of California (Rules of Procedure), all other documents not previously filed in this matter are ordered sealed pursuant to rule 5.12 of the Rules of Procedure.

It is further ordered that protected and sealed material will only be disclosed to: (1) parties to the proceeding and counsel; (2) personnel of the Supreme Court, the State Bar Court and independent audiotape transcribers; and (3) personnel of the Office of Probation when necessary for their duties. Protected material will be marked and maintained by all authorized individuals in a manner calculated to prevent improper disclosures. All persons to whom protected material is disclosed will be given a copy of this order sealing the documents by the person making the disclosure.

Dated: September _____, 2011

DONALD F. MILES
Judge of the State Bar Court